

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Carlton Errol Godwin,)	
)	
Petitioner,)	CIV 13-08078 PCT JAT (MEA)
)	
v.)	REPORT AND RECOMMENDATION
)	
Charles L. Ryan, et al.,)	
)	
Respondents.)	
)	
_____)	

TO THE HONORABLE JAMES A. TEILBORG:

Petitioner, proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on or about April 5, 2013. Respondents filed a Limited Answer to First Amended Petition for Writ of Habeas Corpus ("Answer") (Doc. 17) on November 7, 2013. Petitioner was granted multiple extensions of the time allowed to file a reply to the answer to his petition; the Court's latest order required Petitioner to docket a reply to the answer to his petition on or before March 27, 2015. See Doc. 40. Petitioner has not, as of March 30, 2015, more than one year and five months after an answer was filed, docketed any reply to the answer to his petition.

I Procedural History

Petitioner was arrested on July 7, 2006; the arrest resulted in charges brought in Yavapai County Superior Court

1 case number CR2006-000889. See Answer, Exh. A at 1. On July
2 13, 2006, Petitioner was charged with two counts of driving
3 while under the influence, theft of a credit card, possession of
4 a dangerous drug, possession of a narcotic drug, and possession
5 of drug paraphernalia in CR2006-000889. Id., Exh. B. On July
6 19, 2007, the state successfully moved to dismiss that case
7 without prejudice. Id., Exh. C.

8 On February 1, 2007, Petitioner was arrested; the arrest
9 resulted in charges brought in Yavapai County Superior Court
10 case number CR2007-000204. Id., Exh. A at 1. Respondents aver
11 they have been unable to locate the charging document in that
12 case to determine the nature of the allegations against
13 Petitioner and the case was dismissed on July 17, 2007.
14 However, the arrest on February 1, 2007, also resulted in
15 Petitioner being charged in Yavapai County Superior Court case
16 number CR2007-000205. Id., Exh. D. In that matter Petitioner
17 was charged with possession of marijuana, possession of a
18 dangerous drug for sale, two counts of possession of a narcotic
19 drug for sale, and two counts of possession of drug
20 paraphernalia. Id., Exh. D.

21 Petitioner entered into a plea agreement in CR2007-000205
22 on August 10, 2007. The plea agreement provided Petitioner
23 would plead guilty to possession of a dangerous drug, based on
24 his conduct on July 7, 2006, and to one count of possession of
25 a dangerous drug for sale, based on his conduct on February 1,
26 2007. See id., Exh. E. In exchange for Petitioner's guilty
27 pleas on these two counts the state agreed to dismiss all other

1 charges in CR2007-000205, refrain from re-filing charges in
2 CR2007-000204, and refrain from re-filing any other charges in
3 CR2006-000889. Id., Exh. E. The plea agreement also provided
4 that Petitioner's sentences for his convictions on possession of
5 a dangerous drug and possession of a dangerous drug for sale
6 would total 7.5 years' imprisonment and would be ordered to be
7 served concurrently. Id., Exh. E. Although the written plea
8 agreement contains several hand-written changes to the typed
9 text, Petitioner initialed each change to the typed text,
10 initialed all other appropriate places in the document, and
11 signed the plea agreement.

12 At a hearing conducted August 10, 2007, the state trial
13 court conducted a lengthy colloquy with Petitioner, during which
14 Petitioner averred he understood the terms of the plea
15 agreement. Petitioner told the trial court he understood the
16 rights he was waiving pursuant to the agreement, including his
17 right to a trial and his right to take a direct appeal of his
18 convictions and sentences. See id., Exh. F at 2-15. At that
19 time, pursuant to the plea agreement, the trial court sentenced
20 Petitioner to a term of 7.5 years imprisonment pursuant to his
21 conviction for possession of dangerous drugs for sale, i.e.,
22 methamphetamine, and to a concurrent term of 2.5 years
23 imprisonment pursuant to his conviction for possession of
24 dangerous drugs, i.e., methamphetamine, with credit for 188 days
25 of pre-sentence incarceration. Id., Exh. F at 24-25.

26 More than two years later, on December 22, 2009,
27 Petitioner initiated a state action for post-conviction relief

1 pursuant to Rule 32, Arizona Rules of Criminal Procedure. Id.,
2 Exh. G. Petitioner asserted he did not know CR2006-000889 had
3 been dismissed and that, had he known about the dismissal, he
4 would not have agreed to plead guilty to any charges arising
5 from his conduct on July 7, 2006. Id., Exh. G at 5. Petitioner
6 asserted that his counsel had been ineffective for failing to
7 inform him that CR2006-000889 had been dismissed, and further
8 alleged prosecutorial misconduct warranted vacating his
9 convictions. Petitioner alleged the prosecutor wrongfully
10 induced him to sign a "fraudulent" plea agreement, which
11 Petitioner did not learn about until August 18, 2008; Petitioner
12 asserted this information was newly-discovered evidence excusing
13 the untimeliness of the post-conviction action. Id., Exh. G at
14 3.

15 In a decision entered January 5, 2010, the state trial
16 court dismissed Petitioner's post-conviction proceedings. Id.,
17 Exh. H. The trial court determined the proceedings were
18 untimely and precluded under Arizona procedural law. The state
19 trial court concluded Petitioner's allegedly newly-discovered
20 evidence was not "newly-discovered" because he waited more than
21 sixteen months after discovering the information to initiate
22 post-conviction proceedings. The court further determined
23 relief on any claim regarding the conviction for which
24 Petitioner received a sentence of 2.5 years imprisonment was
25 moot because his current incarceration was a result of the
26 lengthier, concurrent sentence imposed pursuant to his
27 conviction in CR2007-000205. Id., Exh. H.

1 Petitioner sought review of the trial court's decision
2 denying post-conviction relief by the Arizona Court of Appeals,
3 which denied review on July 8, 2011. Id., Exh. I. Petitioner
4 sought review of that decision by the Arizona Supreme Court,
5 which declined review on on March 12, 2012. Id., Exh. J.

6 In his initial habeas petition (Doc. 1) Petitioner alleges
7 he is entitled to relief because he was denied his right to the
8 effective assistance of counsel. Petitioner contends counsel
9 was ineffective because he allowed Petitioner "to enter an
10 uninformed guilty plea to a case/charge which was previously
11 dismissed unbeknownst to the defendant. Counsel failed to
12 investigate original arrest." Id. Petitioner also asserts "The
13 [] criminal case that affected Petitioner's arrest was absent of
14 probably cause to issue 'search warrant' and subsequent 'arrest
15 warrant..." Id. Petitioner alleges he was subjected to
16 "judicial misconduct/abuse of discretion," asserting it was an
17 abuse of judicial discretion to issue an arrest warrant for
18 Petitioner's arrest. Id. Petitioner also argues he was
19 improperly sentenced.

20 In his first amended habeas petition (Doc. 8) Petitioner
21 "challenges the lower court's judgement denying the notice of
22 post-conviction relief as 'untimely'". Id. Petitioner alleges
23 he was subjected to "invalid warrants," i.e., that a police
24 officer was reckless and dishonest in preparing affidavits
25 affecting Petitioner's 'search and seizure'". Id. Petitioner
26 further asserts that he was subjected to "selective
27 prosecution/police misconduct," with regard to a "no knock day
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1 time search warrant," and that he was subjected to "vindictive
2 prosecution." Id. Petitioner alleges that his arrest warrant
3 was signed by the same judge who issued a criminal seizure
4 complaint and who also presided over and ruled in a civil in rem
5 forfeiture action against Petitioner's assets.

6 Respondents contend that the habeas petition is barred by
7 the state of limitations.

8 The Magistrate Judge notes that Petitioner's habeas
9 petition is now arguably moot. On August 10, 2007, Petitioner
10 was sentenced to a term of 7.5 years imprisonment and given
11 credit for 188 days of pre-sentence incarceration. Therefore,
12 Petitioner's prison term must have expired on or before February
13 9, 2015. Petitioner was released from prison on August 1, 2014,
14 and the Arizona Department of Corrections database indicates his
15 "Max End Date" was August 2, 2015, and that he is not currently
16 serving a term of supervised release. Petitioner's current
17 address is in Prescott, Arizona.

18 **II Analysis**

19 The petition seeking a writ of habeas corpus is barred by
20 the applicable statute of limitations found in the Antiterrorism
21 and Effective Death Penalty Act ("AEDPA"). The AEDPA imposed a
22 one-year statute of limitations on state prisoners seeking
23 federal habeas relief from their state convictions. See, e.g.,
24 Espinoza Matthews v. California, 432 F.3d 1021, 1025 (9th Cir.
25 2005); Lott v. Mueller, 304 F.3d 918, 920 (9th Cir. 2002). The
26 one-year statute of limitations on habeas petitions generally
27 begins to run on "the date on which the judgment became final by
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1 conclusion of direct review or the expiration of the time for
2 seeking such review." 28 U.S.C. § 2244(d)(1)(A). For an Arizona
3 non-capital defendant who pleads guilty, the conviction becomes
4 "final" at the conclusion of the first "of-right"
5 post-conviction proceeding under Rule 32, Arizona Rules of
6 Criminal Procedure. "Arizona's Rule 32 of-right proceeding for
7 plea-convicted defendants is a form of direct review within the
8 meaning of 28 U.S.C. § 2244(d)(1)(A)." Summers v. Schriro, 481
9 F.3d 710, 717 (9th Cir. 2007).

10 The AEDPA provides that a petitioner is entitled to
11 tolling of the statute of limitations during the pendency of a
12 "properly filed application for state post-conviction or other
13 collateral review with respect to the pertinent judgment or
14 claim." 28 U.S.C. § 2244(d)(2). See also Artuz v. Bennet, 531
15 U.S. 4, 8, 121 S. Ct. 361, 363-64 (2000); Stewart v. Cate, 757
16 F.3d 929, 934-35 (9th Cir.), cert. denied, 135 S.Ct. 341 (2014);
17 Harris v. Carter, 515 F.3d 1051, 1053 (9th Cir. 2008). "The
18 time during which a properly filed application for State post
19 conviction or other collateral review with respect to the
20 pertinent judgment or claim is pending shall not be counted
21 toward" the limitations period. 28 U.S.C. § 2244(d)(2). A
22 state post-conviction petition is "clearly pending after it is
23 filed with a state court, but before that court grants or denies
24 the petition." Chavis v. Lemarque, 382 F.3d 921, 925 (9th Cir.
25 2004). However, a state petition that is not filed within the
26 state's required time limit is not "properly filed" and,
27 therefore, the petitioner is not entitled to statutory tolling

1 of the federal statute of limitations during the time such a
2 petition is "pending" in the state courts. See Pace v.
3 DiGuglielmo, 544 U.S. 408, 413, 125 S. Ct. 1807, 1811-12 (2005).
4 "When a postconviction petition is untimely under state law,
5 'that [is] the end of the matter' for purposes of § 2244(d)(2)."
6 Id., 544 U.S. at 414, 125 S. Ct. at 1812.

7 Accordingly, the one-year statute of limitations on
8 Petitioner's federal habeas action began to run on or about
9 September 7, 2007, when the time expired to take a timely state
10 action for post-conviction relief from Petitioner's conviction
11 and sentence, and expired on September 7, 2008. Petitioner did
12 not file his federal habeas action until 2013, more than four
13 years after the statute of limitations expired. Petitioner's
14 untimely action for state post-conviction relief was not a
15 "properly filed" state action for post-conviction relief and,
16 therefore, the pendency of this action could not re-start nor
17 toll the state of limitations.

18 The one-year statute of limitations for filing a habeas
19 petition may be equitably tolled if extraordinary circumstances
20 beyond a prisoner's control prevent the prisoner from filing on
21 time. See Holland v. Florida, 130 S. Ct. 2549, 2554, 2562
22 (2010); Bills v. Clark, 628 F.3d 1092, 1096-97 (9th Cir. 2010).
23 A petitioner seeking equitable tolling must establish two
24 elements: "(1) that he has been pursuing his rights diligently,
25 and (2) that some extraordinary circumstance stood in his way."
26 Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814-15
27 (2005). See also Ford v. Gonzalez, 683 F.3d 1230, 1237 (9th

1 Cir. 2012); Porter v. Ollison, 620 F.3d 952, 959 (9th Cir.
2 2010); Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011-14 (9th
3 Cir. 2009). In Holland the Supreme Court eschewed a "mechanical
4 rule" for determining extraordinary circumstances, while
5 endorsing a flexible, "case-by-case" approach, drawing "upon
6 decisions made in other similar cases for guidance." Bills, 628
7 F.3d at 1096-97.

8 The Ninth Circuit Court of Appeals has determined
9 equitable tolling of the filing deadline for a federal habeas
10 petition is available only if extraordinary circumstances beyond
11 the petitioner's control make it impossible to file a petition
12 on time. See Chaffer v. Prosper, 592 F.3d 1046, 1048-49 (9th
13 Cir. 2010); Porter, 620 F.3d at 959; Waldron-Ramsey, 556 F.3d
14 at 1011-14 & n.4; Harris v. Carter, 515 F.3d 1051, 1054-55 & n.4
15 (9th Cir. 2008); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir.
16 2003), modified on other grounds by 447 F.3d 1165 (9th Cir.
17 2006). Equitable tolling is only appropriate when external
18 forces, rather than a petitioner's lack of diligence, account
19 for the failure to file a timely habeas action. See Chaffer,
20 592 F.3d at 1048-49; Waldron-Ramsey, 556 F.3d at 1011; Miles v.
21 Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). Equitable tolling
22 is also available if the petitioner establishes their actual
23 innocence of the crimes of conviction. See Lee v. Lampert, 653
24 F.3d 929, 933-34 (9th Cir. 2011).

25 Equitable tolling is to be rarely granted. See, e.g.,
26 Waldron-Ramsey, 556 F.3d at 1011; Jones v. Hulick, 449 F.3d 784,
27 789 (7th Cir. 2006); Stead v. Head, 219 F.2d 1298, 1300 (11th

1 Cir. 2000). Equitable tolling is inappropriate in most cases
2 and "the threshold necessary to trigger equitable tolling [under
3 AEDPA] is very high, lest the exceptions swallow the rule."
4 Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002).
5 Petitioner must show that "the extraordinary circumstances were
6 the cause of [her] untimeliness and that the extraordinary
7 circumstances made it impossible to file a petition on time."
8 Porter, 620 F.3d at 959. It is Petitioner's burden to establish
9 that equitable tolling is warranted in his case. See, e.g.,
10 Porter, 620 F.3d at 959; Espinoza Matthews v. California, 432
11 F.3d 1021, 1026 (9th Cir. 2004); Gaston, 417 F.3d at 1034.

12 Petitioner has not stated a legitimate basis for equitable
13 tolling of the statute of limitations. Compare Holland, 130 S.
14 Ct. at 2564; Porter, 620 F.3d at 961 (noting the circumstances
15 of cases determined before and after Holland). A petitioner's
16 pro se status, ignorance of the law, and lack of legal
17 representation during the applicable filing period do not
18 constitute circumstances justifying equitable tolling because
19 such circumstances are not "extraordinary." See, e.g., Chaffer,
20 592 F.3d at 1048-49; Waldron-Ramsey, 556 F.3d at 1011-14;
21 Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006);
22 Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir. 2004).
23 Equitable tolling may be available when a petitioner can
24 establish they are so mentally ill that they are incompetent.
25 Compare Laws v. Lamarque, 351 F.3d 919, 923 (9th Cir. 2003),
26 with Bills, 628 F.3d at 1098. However, the vicissitudes of
27 prison life are not "extraordinary" circumstances that make it

1 impossible to file a timely habeas petition. See, e.g., Ramirez
2 v. Yates, 571 F.3d 993, 997 (9th Cir. 2009).

3 The Ninth Circuit Court of Appeals has held that a
4 petitioner is entitled to tolling of the statute of limitations
5 if they can establish that they are actually innocent of the
6 crimes of conviction. See Lee, 653 F.3d at 934. The petitioner
7 must show "it is more likely than not that no reasonable juror
8 would have convicted him in the light of the new evidence." Id.
9 at 938. Petitioner has not made such a showing.

10 Because the habeas action was not filed within the statute
11 of limitations and Petitioner has not stated a proper basis for
12 equitable tolling of the statute of limitations, the Court need
13 not consider the merits of his claims.

14 **III Conclusion**

15 Petitioner did not file the habeas petition within one
16 year of the date his state conviction became final. Petitioner
17 has not established that he is entitled to equitable tolling of
18 the statute of limitations.

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20 **IT IS THEREFORE RECOMMENDED that** Mr. Godwin's Petition for
21 Writ of Habeas Corpus be denied and dismissed with prejudice.

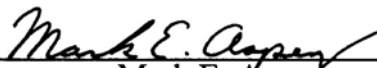
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23 This recommendation is not an order that is immediately
24 appealable to the Ninth Circuit Court of Appeals. Any notice of
25 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
26 Procedure, should not be filed until entry of the District
27 Court's judgment.

1 Pursuant to Rule 72(b), Federal Rules of Civil Procedure,
2 the parties shall have fourteen (14) days from the date of
3 service of a copy of this recommendation within which to file
4 specific written objections with the Court. Thereafter, the
5 parties have fourteen (14) days within which to file a response
6 to the objections. Pursuant to Rule 7.2, Local Rules of Civil
7 Procedure for the United States District Court for the District
8 of Arizona, objections to the Report and Recommendation may not
9 exceed seventeen (17) pages in length.

10 Failure to timely file objections to any factual or legal
11 determinations of the Magistrate Judge will be considered a
12 waiver of a party's right to de novo appellate consideration of
13 the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
14 1121 (9th Cir. 2003) (en banc). Failure to timely file
15 objections to any factual or legal determinations of the
16 Magistrate Judge will constitute a waiver of a party's right to
17 appellate review of the findings of fact and conclusions of law
18 in an order or judgment entered pursuant to the recommendation
19 of the Magistrate Judge.

20 Pursuant to 28 U.S.C. foll. § 2254, R. 11, the District
21 Court must "issue or deny a certificate of appealability when it
22 enters a final order adverse to the applicant." The undersigned
23 recommends that, should the Report and Recommendation be adopted
24 and, should Petitioner seek a certificate of appealability, a
25 certificate of appealability should be denied because Petitioner
26 has not made a substantial showing of the denial of a
27 constitutional right as required by 28 U.S.C.A § 2253(c)(2).

1 DATED this 30th day of March, 2015.

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4 Mark E. Asper
United States Magistrate Judge
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